TANG SHEW KAI v. REG.

[A. Cr. J. (Whyatt C. J.) November 3, 1955]

[Singapore — Magistrate's Appeal No. 104 of 1955]

Sale of Food and Drugs Ordinance (Cap. 148), ss. 16 & 20 — Selling an adulterated drug without fully informing the purchaser at the time of sale of the nature of the adulteration — Requirement that proceedings must be instituted within 28 days of the purchase of the drug — When proceedings are instituted — Meaning of adulterated drug

This was an appeal from the conviction of the appellant on a charge of selling an adulterated drug without fully informing the purchaser at the time of the sale of the nature of the adulteration. A preliminary objection to the prosecution was taken on the ground that the proceedings had not been instituted within twenty eight days of the purchase of the drug as prescribed by subsection (4) of section 20 of the Sale of Food and Drugs Ordinance. The purchase in this case was made on October 12, 1954 and the food and drugs inspector laid a complaint in the then City Police Court within the period of twenty eight days on November 5, 1954 but the summons was not issued by the Magistrate until November 13. It was also contended that the prosecution had not proved that the medicine in this case was an adulterated drug within the meaning of the Sale of Food and Drugs Ordinance.

Held: (1) proceedings were instituted in this case when the complaint was made on November 5, 1954 and therefore since this date fell within the time limited by the Ordinance, the Magistrate had jurisdiction to hear the case; (2) the evidence of the Government Analyst in this case was sufficient in the absence of any evidence to the contrary to justify the learned Magistrate in finding that the medicine in question, the bottle of which contained 19 times the amount of a safe daily intake of lead, is a drug containing a substance which may operate to the prejudice of the consumer and therefore the appeal should be dismissed.

MAGISTRATE'S APPEAL.

N. L. Macassey for the appellant.

H. B. Livingstone (Crown Counsel) for the respondent.

Whyatt C.J. : — This is an appeal from a decision of the learned Magistrate convicting the appellant of selling an adulterated drug without fully informing the purchaser at the time of the sale of the nature of the adulteration. The drug which is imported from Hong Kong and is known as Yim Si San contains 3.8% of lead and the substantial question in this appeal is whether the drug was, by reason of the presence of this quantity of lead, an adulterated drug within the meaning of the Sale of Food and Drugs Ordinance.

The appellant took a preliminary objection to the prosecution on the ground that the proceedings had not been instituted within twenty-eight days of the purchase of the drug as prescribed by sub-section (4) of section 20 of the Sale of Food and Drugs Ordinance. The purchase was made on the 12th October 1954 and the food and drugs inspector laid a complaint in the City Police Court within the period of twenty-eight days on the 5th November, but the summons was not issued by the Magistrate until the 13th November. The appellant has contended that the relevant date for determining when the proceedings were instituted is the date of the issue of the summons and that the laying of the complaint, whatever consequences may have resulted from it, did not institute the present proceedings. Counsel for the Crown informed the Court that he had been unable to find any decided case dealing with this question and consequently the point falls to be decided without the guidance of any previous judicial decision.

It is necessary to have in mind at the outset that a summons is merely machinery to compel attendance in Court and that before any question of compelling a person's attendance can arise, a number of legal processes have to be completed in pursuance of the provisions of the Criminal Procedure Code. First, a complaint or allegation has to be made to a Magistrate that someone has committed an offence; secondly, the Magistrate has to take cognizance of the offence; thirdly, the Magistrate, subject to certain exceptions, has to examine on oath the person making the allegation; fourthly, if the Magistrate sees reason to doubt the truth of the complaint, he has to enquire into the case himself or direct a police officer to do so; fifthly, and finally, when he is satisfied that there are grounds for proceeding, he issues a summons compelling the attendance of the accused.

The processes which have taken place up to that stage are clearly proceedings in relation to the particular offence which is being investigated, and it would, in my view, be as unreal as it would be inaccurate to say that such proceedings have not been instituted merely because the Magistrate does not until a later stage, issue a summons to compel the attendance of the accused. Furthermore if the issue of the summons were to be treated as the effective date for instituting proceedings, no prosecutor could be sure that they would be instituted within the statutory period since after making his complaint, the prosecutor no longer has any control over the time which elapses before the summons is actually issued. That depends upon the speed with which the machinery of the Courts is functioning at that particular juncture; it may take a very short time or it may take several days as it did in the present instance. It is clearly not the intention of sub-section (4) of section 20 that the question whether proceedings were instituted in time should depend upon uncertain and incalculable factors outside the control of the prosecutor. In my judgment, proceedings were instituted in the present case when a complaint was made on the 5th November 1954 and therefore, since

this date falls within the time limited by the Ordinance, the Magistrate had jurisdiction to hear the case.

I now turn to consider whether this medicine was an adulterated drug within the meaning of the Sale of Food and Drugs Ordinance. This question involves a consideration of paragraph (a) of section 16 of the Ordinance which defines the circumstances in which a drug shall be deemed to be adulterated. The paragraph falls into two parts; the first deals with the case where a drug is deemed to be adulterated because its beneficial properties have been diminished as compared with the drug in a pure and normal state; and the second deals with a drug which is deemed to be adulterated because it contains a substance which may operate to the prejudice or disadvantage of a consumer. The Crown contended that the second part of the definition was applicable to the present case since this was a case where the drug contained a substance which operated or might operate to the prejudice or disadvantage of the consumer. The appellant, on the other hand, contended that the first part of the definition applied and therefore the prosecution should fail because, as stated in the fourth ground of the appeal, there was no evidence that lead was not a normal ingredient of this drug. In my judgment the contention of the Crown on this point is sound. The words of the second part of the definition are clear and in my view, are entirely appropriate to a case where it is alleged that a drug contains a substance — in this case lead — which may operate to the prejudice of the consumer.

The last question I have to consider is whether the evidence called by the prosecution establishes that this drug falls within the definition as so construed and I confess that this part of this case has given me considerable difficulty. The only expert evidence called by the prosecution was that of the analyst and while no one questioned his ability to make an accurate analysis of the drug, showing, in his analysis, the precise amount of lead it contained, when it came to giving evidence as to the quantity of lead which would have to be consumed and the time which would have to elapse before symptoms of acute or chronic lead poisoning appeared, his evidence was not convincing. Nor is this surprising since such questions are the concern of doctors rather than analysts. But at the same time it must be remembered that it was not incumbent on the prosecution to prove that the drug would cause acute or chronic lead poisoning within any specified period. All that the prosecution had to prove was that this medicine, Yim Si San, contained a substance, namely lead, which might operate to the prejudice or disadvantage of any one consuming it.

It is, of course, necessary that a witness giving evidence on this limited aspect of the matter should have some knowledge of the effects of lead on the human body when it is consumed in medicine, but he need not have all the detailed knowledge necessary to enable him to give an opinion as to the quantities and time required to produce acute or chronic lead poisoning. Now the analyst who gave evidence for the prosecution in this case said that he had studied the effect of lead on the human body and consequently he was able to say that the amount of lead in this medicine, namely, 38 milligrams per bottle, was dangerously high. The safe daily intake, in his opinion, was 1 to 2 milligrams and it does not require much argument to show, on this hypothesis, that a bottle a day, equivalent to a daily intake of 19 times that quantity, might operate to the prejudice of the person taking it. Evidence was given that the label on the bottle indicated that the medicine might be used for gripes, convulsions, colds and so forth and the directions enclosed with the bottle state that an adult may take 2 bottles, if serious, 3 bottles, and an infant a few months old, 1 bottle, if serious, 2 bottles. It is to be noted that no where do the directions say what interval of time should elapse between the doses. That is left entirely in the air. It is not surprising that the appellant in his grounds of appeal should seek to overcome this difficulty by stating that there was no evidence that the medicine might operate to the prejudice of a consumer "when used in a reasonable manner". The very fact that the appellant postulates that this medicine should be used in a reasonable manner implies that if it is not so used, it may be harmful to the consumer. But who is to say what constitutes using the medicine in a reasonable manner? Certainly not the consumer who is blissfully ignorant that it contains any lead at all. And in any case, a consumer suffering from gripes might well take a different view of what is a reasonable user from one who is merely suffering from a common cold. In my opinion the appellant's contention regarding reasonable user cannot be supported, either on the facts of the case or on the construction of the definition.

The evidence of the analyst was, in my judgment, sufficient in the absence of any evidence to the contrary, to justify the learned Magistrate in finding that this medicine, Yim Si San, one bottle of which contains 19 times the amount of a safe daily intake of lead, is a drug containing a substance which may operate to the prejudice of the consumer. The appeal should, therefore, be dismissed. The appellant's counsel asked that in the event of the appeal being dismissed, the decision of the Magistrate regarding the publication

of a notification of the conviction in a newspaper under section 15, might be reversed on the ground that a long time had elapsed since the conviction and in any case this medicine was not now being imported by the appellant from Hong Kong for sale in Singapore. The Magistrate, in making the order, no doubt had in mind that the provisions of this section are designed to protect the public and even if the result of invoking them might be to harm the appellant's business, the interests of the public in this case required him to make this order. I can find nothing in the case to suggest that it was not a proper order to make in all the circumstances and in my view there are no sufficient grounds for disturbing it.

Appeal dismissed.

Solicitors: *Battenberg & Talma.*

ABDUL HAMID v. PUBLIC PROSECUTOR

[A. Cr. J. (Smith J.) August 18, 1956]

[Seremban — Criminal Appeal No. 11 of 1956]

Prevention of Corruption Ordinance, 1950, ss. 3 & 12 — What amounts to an offence under s. 3 of the Ordinance — Distinction between "consent" and "sanction" to prosecute — "Rights and powers" in s. 376(iii) of the Criminal Procedure Code (Cap. 6) — Scope of.

Summary trial — Evidence of similar facts — Same transaction — Finding of 'guilty' whether to be formally recorded.

In this case the learned Judge held that to establish an offence under section 3 of the Prevention of Corruption Ordinance, 1950, it is not necessary to show that the favour sought was within the power of the accused, but the favour shown must then have been within the power of the accused's principal.

There is an essential difference between a sanction and a consent. A prosecution can be sanctioned without any deep consideration of the particular case: full consideration is required for consent since "consent" is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. A sanction is therefore no evidence of consent.

The very general words "rights and powers" appearing in section 376(iii) of the Criminal Procedure Code are sufficient to permit a Deputy Public Prosecutor to consent to a prosecution under the Prevention of Corruption Ordinance.

Where there are other offences of the same kind which are all part of one and the same transaction evidence thereof is properly admissible.

There is no requirement in section 173(m)(2) of the Criminal Procedure Code that the finding of "Guilty" shall be formally recorded unless the accused pleads guilty. It is sufficient if the record shews clearly that the Court did find the accused guilty.

Cases referred to:—

(1) *R. v. Metz* 11 Cr. App. R. 164.

(2) *Hiralal Badlo v. R.* (1950) M.L.J. 96.

(3) *Raju v. R.* (1953) M.L.J. 21.

(4) *R. v. Rearden* 4 F. & F. 76; 176 E.R. 473.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph (Jr.) for the appellant.

L. A. Massie (Federal Counsel) for the respondent.

Smith J. : — The essential facts of this case were as follows.

The complainant applied for a post in the Home Guard. Hearing nothing he asked the accused about his application, the accused being at the time an Assistant Home Guard Officer and in charge of the Home Guard in Kuala Pilah. The complainant asked the accused whether there was a vacancy for a Permanent Staff Instructor. The accused told the complainant to write out an application for the post which the complainant did. The complainant handed the application to the accused who said that the complainant must pay him $100 or he would not recommend him. The complainant, who at the time had only $40, gave the $40 to the accused who said that the complainant was not to worry and that he would get the post. This was on 15th February 1956. On 23rd February the accused sought out the complainant and asked if the complainant had the balance of $60. The complainant had only $20 which the accused took. On 28th February the complainant approached the accused asking if his appointment had been approved. The accused asked for the balance of $40. The complainant gave accused the balance of $40. The accused had no authority to recruit personnel into the Home Guard.

The accused was tried upon the following charge which relates to the final payment of $40 :—

That you on the 28th day of February, 1956, at Kuala Pilah in the State of Negri Sembilan being an agent of the Government of the Federation of Malaya namely an Assistant State Home Guard Officer corruptly accepted the sum of $40 from Samsudin bin Haji Salam as a reward for doing an act in relation to your principal's affairs, namely for the purpose of recruiting the said Samsudin into the Home Guard as a Sergeant in the Home Guard, and that you have thereby committed an offence contrary to and punishable under Section 3 of the Prevention of Corruption Ordinance, 1950.

It was submitted first that there had not been a consent to the prosecution as required by section 12 of the Prevention of Corruption Ordinance, 1950 (hereinafter called 'the Ordinance') which reads :—

"12. A prosecution under this Ordinance shall not be instituted except by or with the consent of the Public Prosecutor."

It was objected that Exhibit P1 was not signed by the Public Prosecutor personally and was a sanction under the Criminal Procedure Code and therefore not a consent. Exhibit P1 reads as follows :—